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RIGHT OF REAL ESTATE AND LOAN BROKERS TO COMMISSIONS.

Preliminary.—"In principle the case of a broker negotiating a loan is the same as that of a broker negotiating a sale of property," and in this article both subjects will be treated together: *Vinton* v. *Baldwin*, 88 Ind. 104; *Budd* v. *Zoller*, 52 Mo. 238.

The Usual Contract.—The right of a broker to commission, earned in the sale of real estate or the procuring of a loan, depends upon contract with his employer. The broker may make almost any kind of a contract with his employer, upon which his right to a commission may depend; it may therefore rest on many contingencies: *Hinds* v. *Henry*, 36 N. J. L. 328. The usual contract, however, between the broker and his employer desiring to sell, is that the former will procure a purchaser for him. Sometimes conditions are annexed—as that the sale should be made, or the purchaser should be a person acceptable to the vendor. If the contract be to furnish a purchaser, the broker's commissions are earned when a purchaser able and willing to buy on the terms proposed, is found by the broker and introduced to the vendor: *Vinton* v. *Baldwin*, 88 Ind. 104; *Gillett* v. *Corum*, 7 Kan. 156; *DeLaplaine* v. *Turnley*, 44 Wis. 31; *McGavock* v. *Woodlief*, 20 How. 221; *Hague* v. *O'Conner*, 1 Sweeny 472; s. c. 41 How. Pr. 287; *Smith* v. *Smith*, 1 Sweeny 552; *Reynolds* v. *Tompkins*, 23 W. Va. 229;

Coleman v. *Meade*, 13 Bush 358; *Pearson* v. *Mason*, 120 Mass. 53; *Leete* v. *Norton*, 43 Conn. 219; *Hoyt* v. *Shipherd*, 70 Ill. 309; *Ward* v. *Lawrence*, 79 Id. 295; *Dennis* v. *Charlick*, 13 N. Y. Sup. Ct. 21; *Pratt* v. *Hotchkiss*, 10 Ill. App. 603; *Finnerty* v. *Fritz*, 5 Col. 174; *Green* v. *Robertson*, 64 Cal. 75; *Casady* v. *Seely*, 29 N. W. Rep. 432; *Hamlin* v. *Schulte*, 27 Id. 301; *Jones* v. *Adler*, 34 Md. 440; *Glentworth* v. *Luther*, 21 Barb. 145; *Doty* v. *Miller*, 43 Id. 529; *Middletown* v. *Findla*, 25 Cal. 76; *Chilton* v. *Butler*, 1 E. D. Smith 150; *Morgan* v. *Mason*, 4 Id. 636; *Clapp* v. *Hughes*, 1 Phila. 382; *Barnard* v. *Monnot*, 34 Barb. 90. The customer produced by the broker must not only be ready and willing to comply with the terms of the contract, but he must have the present ability to consummate it or to comply with all its terms. If the sale be for cash, he must have the cash or be able to procure it; if upon credit, he must be a person who is not only able to enter into the contract, but also one who is responsible for his contracts and against whom it could be enforced: *Pratt* v. *Patterson*, 3 Atl. Rep. 858; *Duclos* v. *Cunningham*, 6 N. E. Rep. 790; *Coleman* v. *Meade*, 13 Bush 358; *Cook* v. *Kroemeke*, 4 Daly 268; *Kimberly* v. *Henderson*, 29 Md. 512. In a suit to recover commissions it is not necessary to aver that the purchaser was solvent or able to buy. Solvency is presumed; and, if insolvency be relied upon, it must be plead and proven as a defence: *Hart* v. *Hoffman*, 44 How. Pr. 168; *Cook* v. *Kroemeke*, 4 Daly 268; *contra*, *Coleman* v. *Meade*, 13 Bush 358; but the plaintiff must show that the purchaser was willing to accept the contract in its exact terms: *Coleman* v. *Meade*, 13 Bush 358. It is not necessary for the broker to tender the contract of the purchaser in writing; a willingness on his part to buy is sufficient in this respect: *Cook* v. *Kroemeke*, 4 Daly 268. It is no defence on the part of the owner of the land that the title to his land is defective, and for that reason the person produced by the purchaser would not buy: *Gonzales* v. *Broad*, 57 Cal. 224; *Doty* v. *Miller*, 43 Barb. 529; *Topping* v. *Healey*, 3 F. & F. 325. And where the employment is to purchase a certain named tract of real estate, if the broker brings the owner and his employer together, it is no defence for refusing to take it on account of its defective title. The employer should have contracted against such a contingency with his broker before he had procured the owner to sell it: *Knapp* v. *Wallace*, 41 N. Y. 477.

Procuring Cause.—To entitle the broker to commissions he must have been the procuring cause of the sale or purchase: *McClave* v. *Paine*, 49 N. Y. 561; s. c. 41 How. Pr. 140; *Lloyd* v. *Mathews*, 51 N. Y. 124; *Lincoln* v. *McClatchie*, 36 Conn. 136; *White* v. *Twitchings*, 26 Hun 503; *Earp* v. *Cummins*, 54 Penn. St. 394; *Wylie* v. *Marine Nat. Bank*, 61 N. Y. 415; *Bayley* v. *Chadwick*, 39 L. T. N. S. 429; s. c. 36 Id. 740.

Thus a defendant left with the plaintiff a lot to sell at private sale for $6500, the latter to receive one per cent. as commission. The defendant was to have the right to sell it himself, and in that case the broker was not to have any commission. The plaintiff entered the lot in his description book, kept in his office for the consultation of his customers. Afterwards the plaintiff reduced the price upon the description book to $6000, supposing he had the defendant's consent so to do, but which in fact he did not have. Then the plaintiff advertised certain other houses for sale. One Goodwin residing in the neighborhood of those houses, was looking for a house for his friend Burdick. He also took an interest in the real estate matters in his neighborhood, and was attracted by the advertisement to the plaintiff's office, where he learned from the plaintiff that the defendant's house was for sale. The plaintiff gave him the price as $6000. Goodwin subsequently informed Burdick that the house could be purchased for $6000; and the latter asked him to look at it and report to him, which he did, advising him to buy. Burdick then examined the house himself, and soon after entered into negotiations with the defendant personally, which resulted in the latter selling to him the place (with a few articles of personal property worth less than $100), for $6500, about one month after Goodwin saw the advertisement referred to. Burdick had no personal intercourse with the plaintiff. Goodwin's connection with the plaintiff in the matter was voluntary. He informed Burdick before he purchased that the house was in the plaintiff's hands for sale at $6000. Under the facts it was held that the plaintiff was entitled to recover of the defendant his commissions, because he was the procuring cause of the sale. "Had Burdick in the first instance requested Goodwin to do what was done by him in this transaction, the case would have stood precisely as if Burdick had procured the information himself from the plaintiff, on the principle *qui facit per alium facit per se*, and the defendant in that case would clearly have been liable. Is the case

materially different? Goodwin acted for Burdick in procuring the information. He did not casually obtain it, but went to the office of the plaintiff to ascertain what intelligence he had to disclose. Burdick acted upon the information when communicated to him by Goodwin, knowing from what source it had been obtained. He adopted the acts of Goodwin, which was equivalent to a previous request to perform the acts. The plaintiff was pursuing the business of a broker in giving the information, and Goodwin received it for Burdick in the capacity of a messenger and conveyed it to him. Suppose Goodwin had informed the plaintiff for what purpose he inquired, and the information had been given for the purpose of being communicated to Burdick, would the case for the plaintiff have been stronger? The information was given in order to procure a purchaser, and can the fact that Goodwin did not make known for whom he was acting make any material difference, when his act operated directly to bring the buyer and seller together? They show that the plaintiff was the procuring cause of the sale, as much as would have been the case if Goodwin had made known his business, or Burdick had gone in person to the office of the plaintiff and obtained the information himself. The defendant further claims that he specially reserved the right to sell the property without being liable to pay a commission to the plaintiff. We think the proper construction of the understanding was, that the defendant should have the right to sell to a purchaser found by him independently of the plaintiff's procurement:" *Lincoln* v. *McClatchie*, 36 Conn. 136; s. c. 10 Am. L. Reg. 634.

Where an agent advertised a farm for sale at his own expense, under a contract with the owner to furnish a purchaser, and a farmer seeing it, directed the purchaser to the owner, the agent was held entitled to his commission: *Anderson* v. *Cox*, 16 Neb. 10; *Earp* v. *Cummins*, 54 Penn. St. 394; *contra*, *Charlton* v. *Wood*, 11 Heisk. 19. But merely putting a purchaser on the track of property is not equivalent to presenting him to the seller, so as to entitle the broker to a commission: *Sievers* v. *Griffin*, 14 Ill. (2d) (App.) 63. If the broker introduced the purchaser to the defendant for a different purpose, which was accomplished, and the acquaintance thus brought about between the parties led ultimately, without further intervention of the broker, to the sale of the property in question, the broker is not entitled to his commission: *McClave*

v. *Paine*, 2 Sweeny 407; s. c. 41 How. Pr. 140; *Desmond* v. *Stebbins*, 5 N. E. Rep. 151.

A person desiring a loan made application in writing upon which was an endorsement authorizing a single broker to procure the loan, and the broker left copies of such application with a number of persons, one of whom, induced by the application, without the broker's knowledge, lent the money. It was held that the broker was the procuring cause of the loan, and entitled to his commission: *Derrickson* v. *Quimby*, 43 N. J. L. 373.

A. employed B. to sell a house. B. procured of C. an offer of $5000, which B. advised A. to accept. A. afterwards negotiated a sale of the house to C. for $5300. It was held that B. was not entitled to a commission on the sale; for A. was the procuring cause: *White* v. *Twitchings*, 26 Hun 503. So if the services of the broker do not accomplish the sale, and, after the proposed purchaser has decided not to buy, other persons induce him to buy, the broker has no right to a commission: *Earp* v. *Cummins*, 54 Penn. St. 394.

Same continued.—A., desiring additional capital in his business, wrote to B. (accountants in London, with whom he had been in correspondence on the subject), as follows: "The land and premises of the Britannia Works in this town are my property solely, but the business is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of five per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." B. succeeded in introducing one W. to A., who advanced him by way of loan 10,000*l.*, upon which B. received the agreed commission. Some few months afterwards A. and W. entered into an agreement for a partnership, on which occasion W. made a further advance of 4000*l.* by way of capital to the concern. B. claimed commission upon this further advance; and, in an action brought to enforce his claim, he admitted that the advance of the 4000*l.* was not contemplated at the time of the advance of the 10,000*l.*, but that the 4000*l.* was advanced solely in consequence of the negotiation for the partnership between A. and W. It was held that B. was not entitled to a commission on the second advance, because it was

not procured by him: *Tribe* v. *Taylor*, 1 C. P. Div. 505; s. c. 17 Moak 389.

The plaintiffs were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars of the sale were entered on their book by them, and they gave a few cards to view the premises. A person who had observed the premises in passing noticed it was for sale, but by whom did not appear. He went to the house, but could not then look over it. He went away under an impression that it was too large. On his way to a railway station he called at the plaintiff's office to inquire about houses; and there received four cards, one of which was for the defendant's house, stating the particulars of the proposed sale. In a few days afterwards he went to the house, but thought the price asked too high, and he went away. This person had no further communication with the plaintiffs; but he subsequently renewed his negotiation with a friend of the defendant's, and ultimately became the purchaser of the lease at a less price than first asked him. The trial judge nonsuited the plaintiff. This was held error, for there was evidence for the jury that the purchaser had become such "through the plaintiff's intervention," and consequently that the plaintiff was entitled to the stipulated commission. It was also held proper to ask the purchaser, "would you, if you had not gone to the plaintiff's office and got the card, have purchased the house?" And to receive his answer, "I should think not:" *Mansell* v. *Clements*, L. R., 9 C. P. 139; s. c. 8 Moak 449.

An auctioneer was employed to sell an estate, under an agreement to receive a certain per cent. as commission if the estate should be sold; and in case the estate was not sold he was to receive a certain sum for his trouble and expense. Having put up the estate at auction, and it failing to sell, the auctioneer was asked by a person who had attended the sale, who was the owner of the property, and he was referred by him to his principal. Ultimately that person, without any further intervention of the auctioneer, became the purchaser. Under these facts the auctioneer was allowed to recover his commission, for through his means the sale was effected: *Green* v. *Bartlett*, 14 C. B. (N. S.) 681; s. c. 32 L. J. (C. P.) 261.

Same continued.—So where the plaintiff's evidence tended to prove that the defendants purchased certain real estate through his instrumentality, he acting as a broker for the seller, he claimed from the defendants a part of his commissions; and this they declined to pay, but promised him part of the profits when they sold. He advised as to the best mode of sale, and procured maps of the property, putting them up in different places; and also putting up signs near the property. He also inserted an advertisement in a newspaper, referring to himself as broker, which was recognised and paid for by the defendants. A purchaser, attracted to the property by the maps, signs and advertisements, opened negotiations for a purchase directly with the defendants, who, therefore, notified the plaintiff of such fact, directed him not to further advertise or make any other efforts to sell, and promised him his commission if the sale was effected, which was done. Under these facts the plaintiff was allowed to recover his commission: *Sussdorff* v. *Schmidt*, 55 N. Y. 319.

A., being the owner of three parcels of land, employed B., a real estate broker, to negotiate sales of them at a specified price for each. B. found a purchaser for one, and the sale was effected, upon which he received his commission. Subsequently A. informed the purchaser of the first tract of his ownership of, and desire to sell, one of the other tracts; and a contract was made between them for a sale and purchase of the latter tract for the price and upon the terms under which B. had been instructed to sell. B. took no part in the last sale, and gave no information to the purchaser. It was held that he was not entitled to a commission on the last sale, on the ground that he was not "an efficient agent in or the procuring cause of the contract:" *McClave* v. *Paine*, 49 N. Y. 561.

A broker informed his principal that a certain person would take the farm (held for sale) at the price named, buy some of the chattels on it, but added that he would "want some things put in trade." It was held that the terms of the purchase, thus indicated, varying from those offered by the principal, the latter might thereafter sell to another without becoming liable to the broker: *Darrow* v. *Harlow*, 21 Wis. 302.

Sale after Agency is Terminated.—Commissions can only be earned and recovered by virtue of a contract existing between the broker and his principal; and if no contract exists no commission will be allowed, however instrumental the broker may have been in

bringing about the sale or purchase: *Pierce* v. *Thomas*, 4 E. D. Smith 354; *Holley* v. *Townsend*, 16 How. Pr. 125; *Earp* v. *Cummins*, 54 Penn. St. 394; *Atwater* v. *Lockwood*, 39 Conn. 45; *Coleman* v. *Garrigues*, 18 Barb. 60; *Redfield* v. *Tegg*, 38 N. Y. 212. The mere ordinary agency of a wife for her husband is not sufficient: *Harper* v. *Goodall*, 10 Abb. N. Cas. 161; s. c. 62 How. Pr. 288; *Wylie* v. *Marine Nat. Bank*, 61 N. Y. 415.

Often claims for commission are made by brokers after the agency is terminated. This termination may be by an express or an implied understanding. Thus where a broker was employed to sell lands on certain terms, and showed them to a person who negotiated wholly with the owner, and bought on lower terms than the agent offered, the owner not knowing that the buyer had had any communication with the broker; and the owner when the negotiations began having notified the broker that his authority was suspended; it was held that the broker could not recover any commission: *Blodgett* v. *Sioux City, &c., Rd.*, 63 Iowa 606.

The son of the owner of a house, at the request of a broker, telegraphed his father for the lowest price. No sale followed at that time because of encumbrances on the real estate. Eight months after the encumbrances were removed, and the sale was effected to the same person proposing at first to buy the house. With the last negotiations the broker had nothing to do; and it was held that he was not entitled to any compensation: *Chandler* v. *Sutton*, 5 Daly 112. The defendant employed a broker to sell a country seat, and the latter introduced R., who proposed to exchange a mine for it. There was no sale at that time. A year and a half after R. bought the place as agent for his wife. The broker was allowed no commission: *Harris* v. *Burtnett*, 2 Daly 189.

So where an agent was employed by a bank to find a purchaser for a certain tract at $80,000, and found one who was willing to pay only $75,000, which the bank refused; but on the same day, after the broker had abandoned the right to furnish a purchaser, the persons who had made the offer of $75,000 raised it to $80,000, which was unknown to the broker, and it was accepted, it was held that the broker was not entitled to any commission: *Wylie* v. *Marine Nat. Bank*, 61 N. Y. 415. See *Chandler* v. *Sutton*, 5 Daly 112; *Bennett* v. *Kidder*, 5 Id. 512; *Dennis* v. *Charlick*, 6 Hun 21; *Schwartze* v. *Yearly*, 31 Md. 270; *Vreeland* v. *Vetterlein*, 33 N. J. L. 247.

Discharge of Agent by the Principal.—Where the authority of an agent employed to sell on commission is revoked by his principal before a sale has been effected, the right of the agent to remuneration for what he has done in endeavoring to effect a sale depends on the terms on which he was employed: *Simpson* v. *Lamb*, 17 C. B. 603; s. c. 2 Jur. N. S. 91; 25 L. J. C. P. 113. The principal may usually discharge his agent, if he act in good faith, without incurring any liability to him for anything he has performed, if done before the agent has completed the contract between them: *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378. And if the principal permits the agent to proceed in his search for a purchaser until he finds one without notice to him that he is discharged, or that he (the owner) has himself effected a sale, the agent will be entitled to his commission: *Bash* v. *Hill*, 62 Ill. 216. The rule is the same even though the purchaser accepted had been offered before by the agent: *Uphoff* v. *Ulrich*, 2 Ill. App. 399. But after a purchaser is found the principal cannot then discharge the agent and complete the purchase himself so as to deprive the agent of his commission: *Goss* v. *Stevens*, 32 Minn. 472; *Richards* v. *Jackson*, 31 Md. 250; *Prickett* v. *Badger*, 1 C. B. (N. S.) 296; *Phelon* v. *Gardner*, 43 Cal. 306; *Bell* v. *Kaiser*, 50 Mo. 150; *Tyler* v. *Parr*, 52 Id. 249; *Briggs* v. *Boyd*, 65 Barb. 199; *Stillman* v. *Mitchell*, 2 Robt. 523.

"A broker is never entitled to commissions for unsuccessful efforts. The risk is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to compensation. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that

gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labor:" *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378.

"If in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might be justly said to have availed himself of the fruits of the broker's labor:" Id.; *Satterthwaite* v. *Vreeland*, 3 Hun 152.

Principal Effecting a Sale.—The principal may sell his own property after he has placed it in the hands of the broker to a purchaser not procured by the broker, unless he has especially contracted to pay him in the event of a sale procured by himself: *Wylie* v. *Marine Nat. Bank*, 61 N. Y. 415; *Dolan* v. *Scanlan*, 57 Cal. 261; *Dubois* v. *Dubois*, 54 Ia. 216; *Briggs* v. *Rowe*, 1 Abb. App. Dec. 189; *Barnard* v. *Monnot*, 1 Id. 108; *Keys* v. *Johnson*, 68 Penn. St. 42; *McClave* v. *Paine*, 49 N. Y. 561; *Darrow* v. *Harlow*, 21 Wis. 302.

If the broker procure a purchaser, and the owner sells to him, not knowing that the broker had procured him, he is liable for the commission, even though the buyer purchased on the strength of more information than the broker gave: *Hanford* v. *Shapter*, 4 Daly 243; *Bornstein* v. *Lans*, 104 Mass. 214. And if the contract is that the broker shall have a certain time within which to effect the sale, and during such period the owner sell it to a person with whom the agent has had no communication, yet the owner is liable for the commission, because he has deprived the broker of his power to earn it, and he need not produce a purchaser within

the specified time, for the owner has put it beyond his power to complete the contract: *Lane* v. *Albright*, 49 Ind. 275; *Vinton* v. *Baldwin*, 95 Id. 433. Yet where the broker was employed to sell the principal's farm, upon an agreement to pay therefor whatever sum could be realized above a certain sum, and forty days thereafter the principal, who had not reserved any right to find his own buyer, sold the farm for a larger sum than the one named, without the agent's consent, and it was alleged that the agent could within a reasonable time have procured a sale, a complaint based on such facts was held to be bad, and not to entitle the broker to a recovery: *Stewart* v. *Murray*, 92 Ind. 543. M. employed a broker to purchase two lots; L. conducted the negotiations until the owner finally agreed to accept $32,000 net for them. The owner told L. that he would not pay any commission on a sale at that price. L. communicated these facts to his customer, who said that the commission was a small matter, and that he would see to or take care of it. The matter remained in this condition one month, when M. went personally to the owner and completed the purchase at the net price given by the owner to L. It was held that the purchaser was liable for the brokerage: *Lynch* v. *McKenna*, 58 How. Pr. 42.

Sale Broken Off by Principal.—If the broker procure a purchaser who agrees to the terms of the purchase, the principal cannot captiously refuse to complete the sale or purchase: *Delaplaine* v. *Turnley*, 44 Wis. 31; *Fraser* v. *Wyckoff*, 63 N. Y. 445; *Herman* v. *Martineau*, 1 Wis. 151; *Hart* v. *Hoffman*, 44 How. Pr. 168; *Hague* v. *O'Conner*, 41 Id. 287; s. c. 1 Sweeny 472; *Glentworth* v. *Luther*, 21 Barb. 145. A broker who has procured a purchaser is entitled to the agreed commissions, notwithstanding the failure of the purchaser to perform or the vendor's failure to fully understand the contract, if not caused by the fraud or deception of the broker: *Bach* v. *Emerich*, 35 N. Y. Sup. Ct. 548; or where the purchaser refuses to sign the contract of purchase because of the insertion, against the broker's objection, of the usual forfeiture clause: *Beebe* v. *Ranger*, 35 N. Y. Sup. Ct. 452.

Where a broker was employed to sell a house, and it was agreed that if a sale was effected through the agency of the broker, or any other person, he was to receive a certain commission; and the broker advertised the property and made efforts to sell to different persons, among others to a church society; and a parol contract was effected between the principal and the society, and the former

told the broker he had sold the house to the church; and upon the presentation of a written contract the principal refused to sign it, claiming to have withdrawn it from the market, and no contract was ever signed or purchase-money paid, but the sale was thereafter consummated and the property conveyed to the church; it was held that the broker was entitled to his commission upon the production of the purchaser, ready and willing to purchase upon the principal's terms, although the principal was unable or refused to consummate the contract; that the parol contract showed *prima facie* that a proper purchaser had been produced; and the principal, having based his refusal to pay, not upon the ground of the invalidity of the parol contract, but upon that of the withdrawal of the property, could not shield himself from liability upon the former ground: *Mooney* v. *Elder*, 56 N. Y. 238.

Broker must Comply with his Contract.—The broker must comply with the terms of his contract with his principal, however onerous it may be, before he is entitled to his commission; or else compliance with it must be excused by some act of the principal. "Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no valid objections can be stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commissions which the vendor had agreed to pay. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale:" *Kock* v. *Emmerling*, 22 How. 69. See *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378; *Love* v. *Miller*, 53 Ind. 294.

The broker may enter into a contract which limits his right to a commission to the actual receipt of the purchase-money. Thus where the commission was to be three per cent. of the purchase-money the broker was held not entitled to a commission, although the vendor refused to sell on the terms he first designated: *Power* v. *Kane*, 5 Wis. 265.

A surveyor was retained by the defendant to negotiate with the commissioners of certain woods and forests for the sale to them of

certain premises of the defendant, for which he was to receive a commission of two per cent. "on the sum which might be obtained either by private treaty, arbitration, or trial by jury." The parties failing to agree, a jury was empannelled, by whom the value was assessed at 4000*l.*; but an annuity charge rested upon the land, and the commissioners refused to take it until this charge was paid off, and for that purpose placed the amount assessed in the hands of the accountant-general, to await the adjustment of the difference. The surveyor was aware of this annuity charge at the time he entered into the employment. It was held that he was not entitled to any commissions until the money awarded was actually received by the defendant: *Bull* v. *Price*, 5 M. & P. 2; s. c. 7 Bing. 237.

A. negotiated for an exchange of certain advowsons between B. and C., and B. contracted to pay A. 100*l.* for commission, "one-third-down, and the remaining two-thirds when the abstract of conveyance is drawn out." B.'s abstract was delivered to C., but nothing further was done in the matter, because C. declined to proceed with the exchange. A. sued for the recovery of the *balance* of the commission, and it was held that he could not recover; for the event had not happened for which the commission was to be paid: *Alder* v. *Boyle*, 4 C. B. 635; s. c. 11 Jur. 591; 16 L. J. C. P. 232; see *Simpson* v. *Lamb*, 17 C. B. 603; s. c. 2 Jur. (N. S.) 91; 25 L. J. C. P. 113.

A. was employed to sell an advowson for B. upon the terms contained in a circular, in which it was stated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been given by, or any communication whatsoever had been made from, A.'s office, however and by whomsoever the negotiations might have been conducted, and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay a commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission. A contract of sale having been arranged through A.'s agency, and duly executed, and a deposit paid on October 14th, the residue of the purchase-money being payable on December 31st, it was held that A. was entitled to his commission

at all events on December 31st, although the full purchase-money had not, for some unexplained reason, then been paid: *Lara* v. *Hill*, 15 C. B. N. S. 45.

A broker was to receive five per cent. upon the purchase-money when the contract was completed. The owner sold the tract himself and revoked the agent's authority. It was held that he was not liable for commission: *Simpson* v. *Lamb*, 17 C. B. 603; s. c. 2 Jur. N. S. 91; 25 L. J. C. P. 113. But if the commission is payable out of the purchase-money, and the owner arbitrarily refuses to accept, and for that reason the purchase is not completed, the principal is liable: *Cavender* v. *Waddingham*, 2 Mo. App. 551. And a refusal to sign the agreement to sell is equivalent to a refusal to sell: *Neilson* v. *Lee*, 60 Cal. 555.

Where the contract was to effect a sale, but there was inserted in the written contract for the sale a stipulation that if either party should fail to execute it he should forfeit $1000; and the purchaser refused to take the property, paying the forfeiture, it was held that the broker could not recover of the owner, for there was no sale: *Kimberly* v. *Henderson*, 29 Md. 512. See *McGavock* v. *Woodlief*, 20 How. 221.

Same continued.—If the contract is to employ a purchaser on specified terms, the broker cannot recover his commissions if he does not perform that service, unless the employer interfere and prevent a performance; and a discharge of the broker before a customer is secured will not be such an interference, unless he had a certain time within which to procure a customer, and within that time secured one. Under such circumstances, a revocation of his authority within the specified time is a breach of his contract, for which he may have an action: *Toppin* v. *Healey*, 11 W. R. 466. Performance on his part is a necessary condition precedent to a recovery: *Briggs* v. *Rowe*, 1 Abb. App. Dec. 189; *Barnard* v. *Monnot*, 1 Id. 108; *Keys* v. *Johnson*, 68 Penn. St. 42. If the condition is that a purchaser must be produced who consummates the sale, then a sale is a necessary contingency to a recovery: *Richards* v. *Jackson*, 31 Md. 250; *Hyams* v. *Miller*, 71 Ga. 608.

The contract to purchase need not be in writing, unless it is so stipulated, if the purchaser is willing to consummate it: *Heinrich* v. *Korn*, 4 Daly 75; *Fischer* v. *Bell*, 91 Ind. 243; *Barnard* v. *Monnot*, 6 Am. L. R. N. S. 209. But if it is to be in writing, then it must

be such as can be enforced in a court of equity: *Simonson* v. *Kissick*, 4 Daly 183.

If the contract is "to bring the purchaser and vendor together," this "includes the idea of their being bound to each other in a valid contract:" *Tombs* v. *Alexander*, 101 Mass. 255; *Cook* v. *Fiske*, 12 Gray 491.

An owner wrote to a broker his terms of sale, and told him if he could effect a sale the writer would be glad; that the right to refuse offers was reserved, but that the broker might rely on it that if he found customers at the price named, they could have the land and he his commission. The broker found customers for the lands, and it was held that this alone entitled him to compensation: *Hopwood* v. *Corbin*, 63 Iowa 218.

An owner employed a broker to sell certain real estate for a fixed compensation, advising him of the title; the broker found a customer and brought him to the owner, but no sale was effected on account of the defective condition of the title. Afterwards the owner sold the real estate at auction to another person, not found by the broker, at a higher price than the customers had offered, although the latter bid the sum he had offered. It was held that the broker was not entitled to any commission: *Tombs* v. *Alexander*, 101 Mass. 255.

The contract between the broker and his principal was as follows: "If you send, or cause to be sent, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate above described, I will pay you the sum of $200." The broker found a person who proposed to purchase, but the sale was not effected. He was refused a recovery for his compensation: *Walker* v. *Tirrell*, 101 Mass. 257; see *Pratt* v. *Patterson*, 7 Phila. 135; *Brennan* v. *Perry*, 7 Id. 242.

Where the contract was a commission of 2 per cent. on a certain price fixed, and 30 per cent. on any amount obtained beyond that, it was held that the broker was not entitled to a per cent. on portion of the crops growing upon the land sold, which portion was known by him to belong to another than the owner of the land: *Barrett* v. *Johnson*, 64 Penn. St. 223.

An owner employed a broker to find a purchaser for some land, at a certain commission on the purchase-money if a sale were effected. The broker found a purchaser, but the owner refused to complete the sale. It was held that the broker could recover

on a *quantum meruit* for the work and labor done, for he had performed his part of the contract, and the owner had prevented its completion: *Prickett* v. *Badger*, 1 C. B. N. S. 296; s. c. 3 Jus. N. S. 66; 26 L. J. C. P. 33. See *Mooney* v. *Elder*, 56 N. Y. 238; *Sibbald* v. *Bethlehem Iron Co.*, 83 Id. 378; *Inchbald* v. *Western Neilgherry Coffee, Tea and Cinchona Co.*, 34 L. J. C. P. 15; s. c. 17 C. B. N. S. 733.

If the property is put up at auction and bought in by the owner the agent is not entitled to commissions, if it were the understanding, at least, that the owner intended to bid: *Mestaer* v. *Atkins*, 1 Marsh. 76; s. c. 5 Taunt. 381.

Principal Varying Terms of Contract.—Usually the contract between the broker and owner is that a purchaser must be produced who will enter into a certain specified contract; and upon the perfecting of such specified contract, the right to a commission arises: *Schwartze* v. *Yearly*, 31 Md. 270; *Drury* v. *Newman*, 99 Mass. 256; *Hamlin* v. *Schulte*, 31 Minn. 486; *Livezy* v. *Miller*, 61 Md. 336; *Casady* v. *Seely*, 29 N. W. Rep. 432. And if a sale is effected by the owner with the person whose attention is drawn to property by the broker at a lower figure than the broker was authorized to sell at, there is no liability for commission, unless the owner has acted in bad faith, having used the broker to ascertain a purchaser: *Williams* v. *McGraw*, 52 Mich. 480. The principal, however, may so adopt the agent's act in finding a purchaser, by slightly modifying the terms as to entitle him to compensation: *Lawrence* v. *Atwood*, 1 Ill. (App.) 217; *Coleman* v. *Meade*, 13 Bush 358. Thus the broker agreed to sell a farm at a certain price, found a purchaser and brought him to the farm, when the purchaser objected to take so many acres, and the owner then consented to sell a less quantity. They all went to the broker's office and he wrote the deeds. It was held that he was entitled to compensation: *Woods* v. *Stephens*, 46 Mo. 555. Where the agent procured a loan on different terms, it was held that the principal was not liable unless he ratified the act: *Mason* v. *Clifton*, 3 F. & F. 899. Where the broker attempted to procure a loan on certain named terms, but before he did so, the principal changed the terms, and the broker was unable to procure a loan in accordance with the latter terms, but succeeded in getting one on the first, it was held that he was not entitled to a commission: *Toppin* v. *Healey*, 11 W. R. 466. See *Nesbit* v. *Helser*, 49 Mo. 383; *Walton* v. *New Orleans*, 23 La. Ann. 398.

A house agent can only obtain commission on rent obtained as a proximate consequence of his act; and an option to take a house is not exercised if tenancy is continued upon an agreement for a different rent, obtained through the intervention of another house agent. A trade custom to pay commission under such circumstances is irrational and void: *Curtis* v. *Nixon*, 24 L. T. N. S. 706. See generally, *Stewart* v. *Mather*, 32 Wis. 344; *Tower* v. *O'Neil*, 66 Penn. St. 332.

A principal promised to pay a certain per cent. commisssion if the broker would produce a purchaser of his land at 3000*l.* The broker introduced the principal to a person who took a lease for 1000 years, at 150*l.* a year, with the option of purchasing for 3000*l.* within twenty years; it was held that the broker had practically found a purchaser and was entitled to his commission: *Rimmer* v. *Knowles*, 22 W. R. 574; s. c. 30 L. T. N. S. 496. See *Hungerford* v. *Hicks*, 39 Conn. 259.

If the agent sell at a greater price than his principal authorized him, he cannot recover for the excess over the price named, even though his commission is to be a certain per cent. of the selling price. In such an instance it is his duty to communicate the offer so received to his principal, and not to purposely conceal it from him, and if he effect a better trade than authorized to do, his principal is entitled to the benefit. If the agent retains a commission on the surplus, the principal may recover it from him: *Blanchard* v. *Jones*, 101 Ind. 542; *Love* v. *Hoss*, 62 Id. 255.

A contract to sell for cash, means a payment on delivery of the deed: *Goss* v. *Broon*, 31 Minn. 484.

But it is a general rule that the principal's stipulation with his broker as to the price, is not waived by the former selling to the latter's customer at a less price, unless he does so with knowledge that the customer is able and willing to pay the price stipulated in the contract between him and the broker: *McArthur* v, *Slauson*, 53 Wis. 41, distinguishing *Stewart* v. *Mather*, 32 Id. 344.

Time within which to Complete a Sale.—The principal cannot refuse to allow the purchaser a reasonable time to examine the title on the ground that the time allowed the broker within which to effect the sale is about to expire: *Watson* v. *Brooks*, 8 Sawyer 316; *Potvin* v. *Curran*, 13 Neb. 302. See *contra*, *Watson* v. *Brooks*, 11 Ore. 271.

A contract to sell "within a short time," is fulfilled by furnish-

ing a purchaser within two weeks, although during that time the price enhances, of which the owner fails to notify him and of a change made in the terms: *Smith* v. *Fairchild*, 7 Col. 510. Where the sale was to be made "within a reasonable time," twenty-two days was held to fill the requirement: *Lane* v. *Albright*, 49 Ind. 275. "Where no time for the continuance of the contract is fixed by the terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith:" *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378.

Broker acting as Agent of both Vendor and Vendee.—"A real estate or loan broker may recover commissions, although he acts for both parties; but it must appear that he acted openly and fairly, and that all the facts were known to both principals. A broker is regarded as a middleman, and not as an agent in whom peculiar trust and confidence are placed:" *Vinton* v. *Baldwin*, 88 Ind. 104; *Alexander* v. *The Northwestern Christian University*, 57 Id. 466; *Rupp* v. *Sampson*, 16 Gray 398; *Siegel* v. *Gould*, 7 Lansing 177; *Pugsley* v. *Murray*, 4 E. D. Smith 245. This is especially true where he acts as a middleman to bring them together, and they make their own bargain. In such an instance there is no reason why he should disclose his double agency; for he in no way influenced the terms of the contract: *Orton* v. *Scofield*, 61 Wis. 382; *Rice* v. *Wood*, 113 Mass. 133; *Balheimer* v. *Reichardt*, 55 How. Pr. 414; *Rowe* v. *Stevens*, 53 N. Y. 621; s. c. 35 N. Y. Sup. Ct. 189; *Herman* v. *Martineau*, 1 Wis. 151; *Redfield* v. *Tegg*, 38 N. Y. 212.

These cases sometimes arise in exchanges of properties, where the double agency is known. In such instances the owners must both pay, if they both employed him: *Collins* v. *Fowler*, 8 Mo. App. 588; *Mullen* v. *Keetzleb*, 7 Bush 253; *Gordon* v. *Clapp*, 113 Mass. 335; *Rice* v. *Wood*, Id. 133; *Duryee* v. *Lester*, 75 N. Y. 442; *Bell* v. *McConnell*, 37 Ohio St. 396.

A usage among brokers to charge commission to both parties is inadmissible, where the double agency was not disclosed: *Farnsworth* v. *Hemmer*, 1 Allen 494; *Walker* v. *Osgood*, 98 Mass. 348.

If a broker is employed by A. to sell his house, effects a transaction by which the house is bought by B., who sells the house to C., the purchase and price paid by B. being dependent upon the purchase and the price paid by C., by whom the purchase-money,

the amount of which is the same in each, is paid directly to A., who pays the broker a commission for his services in selling A.'s house, the broker cannot maintain an action to recover compensation of C., as if he were employed by C. to buy a house for him: *Follansbee* v. *O'Reilly*, 135 Mass. 80.

There are authorities, however, that deny the right to double compensation under any circumstances: *Lynch* v. *Fallon*, 11 R. I. 311; s. c. 16 Am. L. R. 331; *Everhart* v. *Searle*, 71 Penn. St. 256; *Lloyd* v. *Colston*, 5 Bush 587; *Raisin* v. *Clark*, 41 Md. 158; *Simonds* v. *Hoover*, 35 Ind. 412. Even in case of an exchange: *Bates* v. *Copeland*, 4 McArthur 50. The question of double agency must be raised by a plea: *Duryee* v. *Lester*, 75 N. Y. 442.

Where an agent was employed by two separate owners of real estate to make sale of their separate tracts, and he introduced them to each other, whereby they effected an exchange, it was held that he was entitled to compensation from both of them: *Redfield* v. *Tegg*, 38 N. Y. 212. See *Green* v. *Robertson*, 64 Cal. 75; *Duryee* v. *Lester*, 75 N. Y. 442; s. c. 11 J. & S. 564. Yet where the plaintiff was employed by the defendant as a broker to *sell* or *negotiate a sale* of certain real estate, and the plaintiff, at the same time, was a broker of M., and, subsequently, the defendant proposed to plaintiff an exchange of his premises for those of M., and an exchange was effected, the plaintiff acting in the negotiation for M., it was held that the plaintiff could not recover of the defendant for commissions; for his right to compensation, if any, was under the original employment which had never been consummated; and that his undertaking to act for M. was a renunciation of the agency for the defendant, and nothing short of an unequivocal recognition thereafter by the parties of its existence would establish it: *Carman* v. *Beach*, 63 N. Y. 97.

Several Brokers Employed at the Same Time.—If two brokers are separately employed to *sell* the same property, and each separately call the attention of the purchaser to the property, the one first effecting the sale thereafterwards is entitled to the commission, and the other is not entitled to anything: *Maracella* v. *Odell*, 3 Daly 123; *Dryer* v. *Rauch*, 42 How. Pr. 22; s. c. 3 Daly 434; 10 Abb. N. S. 343; *Ward* v. *Fletcher*, 124 Mass. 224. If the first broker's action causes the sale he is entitled to his commission, although another broker in fact negotiated the sale and obtained a commission: *Winans* v. *Jaques*, 10 Daly 487; but if the sale is

broken off because of a disagreement as to price, and through another broker a sale is effected to the same party on different terms, the first broker is not entitled to compensation: *Livezy* v. *Miller*, 61 Md. 336. Where he employs several brokers the entire duty of the owner is performed by remaining neutral between them; and he has a right to make the sale to a buyer produced by one of them, without being called upon to decide between them as to which of them was the primary cause of the purchase: *Vreeland* v. *Vetterlein*, 33 N. J. L. 247. Elsewhere it is said he must pay the one effecting the sale, and cannot exercise his option: *Eggleston* v. *Austin*, 27 Kan. 245.

If one broker effects a sale the owner should at once notify the others; else he may be compelled to pay more than one commission, if another, in the meantime, without knowledge of the sale, effect a sale: *Fox* v. *Rouse*, 47 Mich. 558.

Notice to one broker of a change of purpose does not affect another, nor is the latter chargeable with notice because of acts of the owner in improving the property inconsistent with a design to sell: *Lloyd* v. *Matthews*, 51 N. Y. 124.

Effect of Misconduct of Agent.—The agent must act in the utmost good faith, especially where he is entitled to a commission on the production of a person ready and willing to purchase: *Pratt* v. *Patterson*, 3 Atl. Rep. (Pa.) 858. Any concealment on his part in any way bearing on the transaction will defeat his claim for compensation: *Bell* v. *McConnell*, 37 Ohio St. 396; even though he have no fraudulent intent: *Pratt* v. *Patterson*, 12 Phila. 460; *Bennett* v. *Kidder*, 5 Daly 512; *Hamond* v. *Holiday*, 1 C. & P. 384; *White* v. *Chapman*, 1 Stark. 113; *Hurst* v. *Holding*, 3 Taunt. 32.

Thus where a sale failed by reason of a tax lien, of which the broker inadvertently failed to inform his principal, it was held that he was not entitled to a commission, and it was no excuse for him to say that the sale would have been consummated if it had not been for his inability to show a clear title: *Rockwell* v. *Newton*, 44 Conn. 333. See *De Santos* v. *Taney*, 13 La. Ann. 151.

A broker may enter into a contract for the exclusion of all other brokers; in which event the owner cannot sell through another agency, and escape a liability to the first broker on his producing a purchaser: *Moses* v. *Bierling*, 31 N. Y. 462.

If the broker is negligent, to the damage of his principal, he cannot recover his commissions. Such was held to be the case when

A. and B. agreed to exchange properties within a certain period by warranty deed, and free from encumbrances, one tract for another; and the broker, as agent of A., preferred a warranty deed for A.'s tract, conveying it to B. subject to certain taxes, and had it executed by A., but on account of the clause relating to the taxes, it was refused by B., of which refusal A. was kept in ignorance until the expiration of the time stipulated: *Fisher* v. *Dynes*, 62 Ind. 348.

Broker as Purchaser.—Where an agent was employed to sell land and sold it to a company of which he was a shareholder and director, it was held that he was not entitled to commissions from his employer, for such conduct could not be said to have been good faith: *Salomons* v. *Pender*, 3 H. & C. 639; s. c. 11 Jur. N. S. 432; 34 L. J. Exch. 95; 13 W. R. 637; 12 L. T. N. S. 267.

The agent cannot find a purchaser in himself unless the owner consents to his purchase: *Tower* v. *O'Neil*, 66 Penn. St. 332. And if he purchase the real estate through a third person he is not entitled to a commission: *Bach* v. *Emerich*, 35 N. Y. Sup. Ct. 548; *Hughes* v. *Washington*, 72 Ill. 84.

If he offer himself as a purchaser, and with the knowledge of the principal becomes the purchaser, either alone or with another; or he is to be paid a commission upon producing a purchaser ready and willing to buy at such a price as may be agreed upon between the parties when brought together, and then himself with the knowledge of the vendor, becomes the purchaser, either alone or jointly with another,—in either case he is not entitled to the commission, unless it was the understanding between him and the vendor at the time of the sale that he should be entitled to it. *Stewart* v. *Mather*, 32 Wis. 344. In such an instance there must be clear proof that the understanding of the vendor at the time of the sale was that the broker should have a commission. *Grant* v. *Hardy*, 33 Wis. 668.

If the clerk of the broker, who has access to his principal's correspondence with his principal, buys the real estate, he will be held as a trustee for his principal: *Gardner* v. *Ogden*, 22 N. Y. 327.

Negotiating the Sale.—If the broker's contract is to produce a purchaser, it is no part of his duty to negotiate the sale. That the owner must do if he desires to reap the benefit of his contract with the broker: *Arnold* v. *Wood*, 13 N. Y. Week. Dig. 302; *Royster* v. *Mageveney*, 9 Lea 148; *Herman* v. *Martineau*, 1 Wis. 151; *Lloyd*

v. *Matthews*, 51 N. Y. 124; *Sibbald* v. *Bethlehem Iron Co.*, 83 Id. 378. If the contract is to complete the purchase, then when the title papers are delivered, his contract is performed, and authority at an end: *Walker* v. *Derby*, 5 Biss. 134.

Fraud upon Vendee.—The vendor, to defeat his agent's claim for commissions, cannot insist that either he or the agent committed a fraud upon the vendee, so long as the vendee does not seek to avoid the contract: *Grant* v. *Hardy*, 33 Wis. 668. Such was held to be the case where the agent fraudulently concealed from the vendee the fact that he was acting as an agent, and advised him as a friend that the property was well worth the price asked, and could not be obtained for less, while in fact, the owner was willing to take much less, and the agent was to receive all over what he was willing to take: *Hardy* v. *Stonebraker*, 31 Wis. 640.

Usage.—A usage prevalent among brokers cannot give one a commission when the sale is made by another: *Pratt* v. *Bank*, 12 Phila. 378. Where several brokers were employed to procure a loan, and one of them did, whereupon the borrower refused to take a second loan, a usage to not pay the second broker in such a case was successfully pleaded to defeat an action by the latter: *Glenn* v. *Davidson*, 37 Md. 365. See *Loud* v. *Hall*, 106 Mass. 404.

Lien.—If employed to secure a loan, the broker has a lien on the money secured for his commissions: *Vinton* v. *Baldwin*, 95 Ind. 433.

Statutory Regulation.—If the broker is required by statute to have a license issued by the state, he cannot recover his commissions, unless he be licensed: *Johnson* v. *Hulings*, 103 Penn. St. 498; *McConnell* v. *Kitchens*, 20 S. C. 430. But this rule is held not to apply to an internal revenue license: *Pope* v. *Beals*, 108 Mass. 561. If the amount of the fees payable to a broker be fixed by statute, it cannot be enlarged by contract: *Perrine* v. *Hotchkiss*, 58 Barb. 77; and if the contract is required by statute to be in writing, there cannot, in absence of a writing, be any recovery upon an implied contract to pay for services rendered: *McCarthy* v. *Loupe*, 62 Cal. 299.

Amount of Commission.—In the absence of a contract as to the amount to be paid, the broker is entitled to recover the value of his services: *Potts* v. *Aechternacht*, 93 Penn. St. 138. The plaintiff

effected a sale of certain real estate for M. for $22,000, under a previous agreement with M. to pay the plaintiff ten per cent. of the amount of which the property should be sold. M. received in part payment another piece of real estate at $7525, which was worth at the time but $4220. It was held that the plaintiff was entitled to ten per cent. of the *real* price for which the property was sold, and not of a fictitious price, or a price that in the trade was regarded by the parties as fictitious. But in determining whether the price named in the contract was real or fictitious, it must be considered how the parties regarded the property received in part payment in reference to its value. If the parties to the contract fixed upon the sum of $7525, as the price they judged it worth, that sum must be the guide, although, in fact, it was of less value; or if the plaintiff and M. judged it worth that price, the result is the same; *Wakefield* v. *Estate of Merrick*, 38 Vt. 82. See *Biggs* v. *Gordon*, 8 C. B. N. S. 638.

Miscellaneous.—If separate owners of distinct parts of an entire tract jointly employ a broker to sell the whole tract, an action may be maintained by him against all jointly, on such contract; but if it be not proven he will fail in his suit: *McGill* v. *Pressley*, 62 Ind. 193. Where it was alleged that the broker was to have five per cent. of the amount of the sale, and proof showed five per cent. of the amount was $5000, there was held to be an immaterial variance: *Menifee* v. *Higgins*, 57 Ill. 50. If the broker retain an excess over the amount at which he was allowed to sell, on a fortunate sale, he is liable to his principal without a demand first made: *Love* v. *Hoss*, 62 Ind. 255.

If an agent of the owner, within the scope of his authority, employ a broker to negotiate a sale, and the owner revoke the agent's authority, and the broker goes on and consummates the sale without notice of such revocation, the owner is liable for his commissions: *Lamson* v. *Sims*, 48 N. Y. Sup. Ct. 281.

The defendant employed the plaintiff to sell the Old South Church, in Boston. The plaintiff talked to P, about buying it for himself. Afterwards, the Old South Church Society was formed to preserve the property, and to raise money P. took a deed of the church property for a mortgage to secure the payment of money loaned. It was held that he was not a purchaser: *Viaux* v. *Old South Society*, 133 Mass. 1.

It is not necessary that the purchaser be made known to the owner as the broker's customer if he is so in fact. The owner is entitled to know that the broker has been instrumental in sending him the customer; but when advised by the latter that he has received information of the purpose to sell, and the price, it is the owner's duty to inquire whence the information was derived: *Lloyd* v. *Matthews*, 51 N. Y. 124. The purchaser need not be introduced to the owner by the broker; and the latter need not be personally acquainted with the purchaser, to entitle him to commission. The question is, was the broker the procuring cause of the sale: *Sussdorff* v. *Schmidt*, 55 N. Y. 319.

The contract between the broker and his principal need not be in writing in order to enable him to recover: *Barnard* v. *Monnot*, 3 Keyes 203; s. c. 33 How. Pr. 440; *Heinrich* v. *Korn*, 4 Daly 74; *Fischer* v. *Bell*, 91 Ind. 243.

W. W. THORNTON.

Crawfordsville, Ind.

RECENT AMERICAN DECISIONS.

Prerogative Court of New Jersey.

CARROLL v. BONHAN.

The statute of New Jersey in relation to nuncupative wills (Revision, 1245) provides, *inter alia*, that such will must have been made at the time of the "last sickness" of the testator or testatrix: *Held*, that the term "last sickness" in said provision, is to be construed as meaning "*in extremis*," and that, therefore, an alleged nuncupative will made by a testatrix during her last illness, nine days before her death, cannot be admitted to probate, where the proof is clear that she had time and capacity to subsequently make a written will if she had so desired.

APPEAL from decree of Hunterdon Orphans' Court, refusing to admit to probate an alleged nuncupative will.

Voorhees & Cotter, for appellant.

R. S. Kuhl, for respondent.

RUNYON, Ordinary.—Asher W. Carroll, the appellant, propounded for probate in the Orphans' Court of Hunterdon county an alleged nuncupative will of his sister, Mary Ann Bonhan, late of that county, deceased, who was the wife of the respondent, Moses Bonhan. The alleged nuncupative will was made on the 9th of April 1886. Mrs. Bonhan was then living with her husband at her home in Hunterdon county. She was ill, and continued to be so until